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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 985.

KRESGE DEPARTMENT STORES, INC.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

ON PETITION FOR CERTIORARI.

REPLY BRIEF FOR PETITIONER.

The Circuit Court of Appeals expressly refused to determine whether there was a relationship of agent and principal between the petitioner and the corporations operating the various department stores (R. 110). Counsel for the respondent now renew the argument made below, that the petitioner was merely the agent of the department stores, and amounts spent in operating the New York City buying office were the expenses of the principal (Brief, p. 7). This argument is unsound. The stores did not, and were in no position to, control the detail of petitioner's daily operations; they could only commission petitioner to produce results by making purchases, obtaining special attractions, securing personnel, etc. Settled principles, expressed

as follows by Justice Brewer in *Casement* v. *Brown*, 148 U. S. 615, 622, are applicable:

> "Obviously, the defendants were independent contractors. * * * They selected their own servants and employees. Their contract was to produce a specified result. They were to furnish all the material and do all the work, and by the use of that material and the means of that work were to produce the completed structures. *The will of the companies was represented only in the result of the work, and not in the means by which it was accomplished.* This gave to the defendants the status of independent contractors, and that status was not affected by the fact that, instead of waiting until the close of the work for acceptance by the engineers of the companies, the contract provided for their daily supervision and approval of both material and work." (Italics added.)

All Russian Textile Syndicate, Inc. v. *Commissioner*, 62 F. (2d) 614 (C. C. A. 2nd), which was cited to the court below and is now cited here, should not be applied to the facts of this case. There the personal holding company statute was not involved. The taxpayer, a New York corporation, was a wholly owned subsidiary of a Russian organization. Among other things, it made purchases in this country for its parent, but the resemblance to the present case ends there. Goods were bought in the name of the subsidiary and there was originally an agreement by the parent to reimburse the subsidiary for the prices paid and for expenses of purchasing. From interest on bank deposits and from trading in cotton futures, the subsidiary obtained income. Then instead of carrying out the original agreement to reimburse for prices paid and expenses of buying, the

parent paid over to the subsidiary only enough to cover the balance left of those items after applying to them the earnings of the subsidiary from other sources. This was an obvious effort to eliminate the net income from interest and cotton futures which would otherwise have been shown; also an effort to pass along to Russia profits actually made in this country. The manipulation of the subsidiary's affairs to suit the parent organization, shows the degree of control which existed and the closeness of the relation. Because the court held on the facts before it that amounts paid by principal to agent were not a part of the agent's gross income and were actually costs of the principal for goods bought by it just as though it had acted without an agent, it does not follow that the decision applies to the much different facts of the present case.

Since the decision of the *All Russian Textile* case, the Circuit Court of Appeals for the same circuit has affirmed (memo. 97 F. (2d) 1023), *Wood* v. *Rasquin*, 21 F. Supp. 211, the cooperative apartment house case, which is cited and relied upon in the petitioner's main brief.

Respectfully submitted,

WARD J. HERBERT,
Counsel of Petitioner.

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